RECENT DECISIONS.

ADMIRALTY—CONTRIBUTORY NEGLIGENCE. The libellant was rightfully on a dredge and seated on a bitt around which a hawser from the anchor passed to a steam winch on board. By reason of a negligent starting of the winch, the bitt broke under the strain and libellant was injured. *Held*, the negligence of libellant was a concurrent cause of the injury and damages should be divided. *The Steam Dredge No. 1* (1904) 134 Fed. 161.

At common law not all negligence on the part of the plaintiff was contributory. Where the defendant, by using ordinary care, might have avoided the damage, he was liable, notwithstanding the negligence of the plaintiff. *Davies* v. *Mann* (1842) 10 M. & W. 545. See *The Bernina* (1887) 12 Prob. Div. 58, 89. The position of the court in the principal case in distinctly refusing to recognize this rule, is opposed to the English practice and somewhat anomalous. There is no difference between law and admiralty as to what amounts to contributory negligence and facts making out a case in one will establish it in the other. *Spaight* v. *Tedcastle* (1881) 6 App. Cases 217; *Cayzer* v. *Carron Co.* (1889) 9 App. Cases 873. A similar judgment to the present case, however, was reached in two previous federal decisions. *The Milligan* (1882) 12 Fed. 338; *The Pegasus* (1884) 19 Fed. 46.

CONSTITUTIONAL LAW—RIVER BOUNDARIES—CONCURRENT JURISDICTION. The defendant was convicted by a Missouri court of Sunday liquor selling on the Mississippi near the Illinois shore. Congress in fixing the boundaries of Missouri provided that the middle of the river should be the boundary, but that Missouri and Illinois should have concurrent jurisdiction over the whole width of the river. *Held*, the conviction was proper. *State* v. *Seagraves* (1905) 85 S. W. 925.

Generally, under this and similar provisions, the state may legislate for the entire river including that part without its territorial boundaries. Its courts will take jurisdiction of acts committed on its boundary rivers beyond its territorial limits, and punish them criminally, *State* v. *Mullen* (1872) 35 Iowa 199; *State* v. *George* (1895) 60 Minn. 503; *State* v. *Metcalf* (1896) 65 Mo. App. 682; *Welsh* v. *State* (1890) 126 Ind. 71; *McFall* v. *Commonwealth* (Ky. 1860) 2 Metc. 394; or give civil relief. *Sherlock* v. *Alling* (1873) 44 Ind. 184; *Sanders* v. *Anchor Line* (1888) 97 Mo. 26; *Opsahl* v. *Judd* (1883) 30 Minn. 126. A process served anywhere on a boundary river will give the court jurisdiction. *Memphis & C. Packet Co.* v. *Pikey* (1895) 142 Ind. 304; *Wedding* v. *Meyler* (1904) 192 U. S. 573, reversing *Meyler* v. *Wedding* (1899) 107 Ky. 310. However, in In re *Mattson* (1895) 69 Fed. 535, acc. *State* v. *Faudre* (1903) 54 W. Va. 122, the court held that if the act were not in itself wrong, a conviction could not be sustained unless there were statutes in both states punishing the act; the cases generally do not make this distinction and *McFall* v. *Commonwealth*, supra, is inconsistent with it.

CONSTITUTIONAL LAW—THIRTEENTH AND FOURTEENTH AMENDMENTS—FEDERAL COGNIZANCE OF THE ACTS OF LYNCHERS. The petitioner was one of a mob that took a negro, charged with murder, out of the custody of the law and hanged him. He was indicted under U. S. Rev. St. § 5508, relating to punishment for interfering with the enjoyment of rights guaranteed by the Federal Constitution and laws. *Held*, the petitioner had deprived the deceased of rights under both the Thirteenth and Fourteenth Amendments. Ex parte *Riggins* (1904) 134 Fed. 404.

See NOTES, p. 465.

CONSTITUTIONAL LAW—POLICE POWERS OF THE STATES—FOURTEENTH AMENDMENT. The defendant was indicted under a statute of the State of New York making unlawful the employment of persons in a bakery for more than an average of ten hours a day or sixty hours in any one week. On writ of error to the Supreme Court of the United States, *held*, the statute violated the Fourteenth Amendment to the Constitution of the United States. *Lockner* v. *New York*. *Decided April 17th, 1905*. See NOTES, p. 462.

CONTRACTS—RIGHT OF A CONVICT TO CONTRACT. A convict, who had escaped, and was subsequently recaptured, sought to recover on the contract for wages earned during the period of his escape, his sentence having expired. It was *held*, he could recover. *McCarron* v. *Dominion Atl. Ry. Co.* (1905) 134 Fed. 762. See NOTES, p. 468.

CORPORATIONS—JURISDICTION-ACTION AGAINST FOREIGN CORPORATION BY CITIZENS OF OTHER STATES. The plaintiff, his residence not appearing, sued a foreign corporation doing business and having agents within the state, on a transitory cause of action arising without the state. *Held*, the court would entertain such actions by a citizen, overruling *Bawknight* v. *Ins. Co.* (1875) 55 Ga. 194; so it must, under Art. IV § 2 of the Federal Constitution, extend its jurisdiction to any citizen of the United States. *Reeves* v. *Southern Ry. Co.* (Ga. 1905) 49 S. E. 674.

Aside from an authorizing statute, if service is lawfully made, suit in such an action is maintainable by a non-resident alien at the discretion of the court. *Johnson* v. *Ins. Co.* (1882) 132 Mass. 432; *Steamship Co.* v. *Kane* (1897) 170 U. S. 100. If the right to sue depends on citizenship, not residence, Art. IV § 2 extends it to all citizens of the United States. *Railway Co.* v. *Nix* (1882) 68 Ga. 572, 580; *Cole* v. *Cunningham* (1889) 133 U. S. 107, 113; *Barrell* v. *Benjamin* (1819) 15 Mass. 354. But where a statute, New York C.C.P. § 1780, limiting the right to residents irrespective of citizenship, is constitutional, *Robinson* v. *Oceanic S.S. Co.* (1889) 112 N. Y. 315, it would seem a non-resident citizen could not sue.

CORPORATIONS—JURISDICTION FEDERAL COURTS—DIVERSE CITIZENSHIP. The complainants were citizens of New Jersey and stockholders in the defendant company, a New York corporation. *Held*, the presumption that stockholders of a corporation are citizens of the state of incorporation did not preclude them from asserting their actual citizenship to sustain the jurisdiction of a Federal Court. *Doctor* v. *Harrington* (1905) 25 Sup. Ct. 355.

An Iowa corporation sued a citizen of New York. The record did not show federal jurisdiction of the plaintiff's assignor. *Held*, the fact that the plaintiff's assignor was president of the plaintiff corporation created no presumption as to his citizenship in the state of incorporation, except for fixing the status of the corporation as a litigant. *Utah-Nevada Co.* v. *De Lamar* (1904) 133 Fed. 133.

A corporation is not a citizen within Art. III § 2 of the Constitution and originally the Federal courts refused jurisdiction for diversity unless all the shareholders were citizens of the state of incorporation. *Bank* v. *Deveaux* (1809) 5 Cranch 61; *Bank* v. *Slocomb* (1840) 14 Pet. 60. But later a corporation was held "entitled, for the purpose of suing and being sued, to be deemed a citizen" of the state of incorporation. *Railway* v. *Letson* (1844) 2 How. 497; and for this purpose the stockholder's citizenship was conclusively presumed, *Muller* v. *Dows* (1876) 94 U. S. 444; *Shaw* v. *Quincy Min. Co.* (1891) 145 U. S. 444, 451; *Barrow Co.* v. *Kane* (1898) 170 U, S. 100, 106. But the courts in the principal cases confine this presumption to that purpose alone and have allowed a stockholder to show his actual citizenship. *Hanchett* v. *Blair* (1900) 100 Fed. 817, 822.

CORPORATIONS—TRANSFER OF STOCK—LIABILITY TO UNREGISTERED TRANSFEREE. Stock certificates containing the notice, "Without the production of this certificate, no transfer of the shares mentioned therein can be registered", were transferred to the plaintiff. Later the transferor executed another transfer to Y. who was recorded as the owner without the production of certificates. In an action against the company for having wrongfully registered the shares, *held*, under the Companies Act, 25 & 26 Vict. c. 89, the production of the old certificates before issuing new ones was discretionary with the company, and the notice was not binding on the company as a representation or a contract. *Rainford* v. *Keith & Blackman Co.* [1905] 1 Ch. 296.

The decision rests entirely upon, and gives effect to, earlier dicta. *Shropshire Union Ry.* v. *Reg.* (1875) L. R. 7, H. L. 496, 509; *Société de Paris* v. *Walker* (1886) 11 Ap. Cas. 20, 29; but contra *Colonial Bank* v. *Whinney* (1886) 11 Ap. Cas. 426, 440. The court properly finds no estoppel in the case, as the plaintiff was not aware of the notice; but its argument as to a contract liability is not convincing. In the United States generally, it is a breach of corporate duty to transfer stock without producing the certificates, *Bank* v. *Lanier* (1870) 11 Wal. 369, which are representations to this effect, *Holbrook* v. *N. J. Zinc Co.* (1874) 57 N. Y. 616; even if notice as to surrender is not on the certificate; *Factors Co.* v. *Marine Dock Co.* (1879) 31 La. An. 149. The same result has been reached seemingly on a contract theory where the certificate holder had no legal title. *N. Y. & N. H. R. R.* v. *Schuyler* (1865) 34 N. Y. 30.

CRIMINAL LAW—DE FACTO JURY. The defendant when placed upon trial for murder objected to the jury on the ground that the statute providing for its organization contravened Art. 3 §18 of the State Constitution. His objection was overruled, he was convicted and sentenced to death. On appeal it was *held* that the defendant having had a fair trial had not been prejudiced and his conviction must stand. *People* v. *Ebelt* (N. Y., 1905) 73 N. E. 235. See NOTES, p. 466.

CRIMINAL LAW—JURISDICTION—STATUTORY CRIMES. An Arkansas statute made it a crime to allow cattle to run at large. The defendant, a resident of Missouri, turned his cattle loose in that state, intending that they should wander into Arkansas, and they did so. *Held*, the statute confers no jurisdiction over a non-resident turning his cattle loose outside the state. *Beattie* v. *State* (Ark. 1904) 84 S. W. 477.

One state may not punish a crime committed in another state, *State* v. *Wyckoff* (1864) 31 N. J. L. 65; *State* v. *Chapin* (1856) 17 Ark. 561; but it may define crimes within its own borders, except treason. Fed. Const., Art. III., Sect. 3. Whether it may extend this definition to cover an act transpiring wholly without its jurisdiction is a mooted question. *State* v. *Knight* (N. C. 1799) 2 Hay. 109; *Com.* v. *Macloon* (1869) 101 Mass. 1; *Hanks* v. *State* (1882) 13 Tex. App. 289; but its power is unquestioned as to acts which like that in the principal case are committed in whole or in part within its jurisdiction. See *People* v. *Merrill* (N. Y. 1855) 2 Parker 590; *Hemmaker* v. *State* (1849) 12 Mo. 453. And the criminal liability of the actor does not depend upon his physical presence within the jurisdiction at the time. *Com.* v. *Blanding* (Mass. 1825) 3 Pick. 304; *U. S.* v. *Davis* (1837) 2 Sumner 482.

EQUITY—ACCOUNTING AGAINST AN AGENT—PROCEEDS OF ILLEGAL BUSINESS. The plaintiff sues for an accounting against an agent for refusing to pay over the proceeds in an illegal business. *Held*, bill not maintainable. *Woodson* v. *Hopkins* (Miss. 1905) 37 So. 1000.

Generally an agent must account for money received in an illegal business, *Baldwin* v. *Potter* (1874) 46 Vt. 402; *Planters' Bank* v. *Union*

Bank (1872) 16 Wall. 483, 499; *Murray* v. *Vanderbilt* (1863) 39 Barb. 140, 152; *Tenant* v. *Elliott* (1797) 1 B. & P. 3; *Wilson* v. *Owen* (1874) 30 Mich. 474. The principal case seems to have applied the disputed rule as to the recovery of illegally earned money by one partner from another; such a recovery has been granted, *Sharp* v. *Taylor* (1848) 2 Phill. 801; *Anderson's Adm'tr's* v. *Whitlock* (Ky. 1867) 2 Bush 398; *Brooks* v. *Martin* (1863) 2 Wall. 70, discredited in *McMullen* v. *Hoffman* (1899) 174 U. S. 639, 666. Decisions of this class may be reconciled by allowing a recovery (1) where the transaction was merely malum prohibitum and not malum in se, *Farley* v. *Railroad Co.* (1882) 14 Fed. 114; (2) after a formal accounting, *Leonard* v. *Poole* (1889) 114 N. Y. 371; or (3) when the partnership itself was not illegal in its formation, *Woodworth* v. *Bennett* (1870) 43 N. Y. 273.

EQUITY—ESTOPPEL BY SILENCE—COUNTERCLAIM. The plaintiff having informed the defendant that one Jacobs had agreed to assign all his claims to the plaintiff for collection, the defendant named orders he intended to give Jacobs, saying he would be personally liable therefor, but said nothing to the plaintiff of an existing credit against Jacobs. *Held*, on suit for the value of the orders, the defendant was estopped, by his silence, from setting up this credit as a counterclaim. *House* v. *Brilliant* (1905) 92 N. Y. Supp. 325.

Where the parties have equal knowledge of the facts mere silence will not create an estoppel, *Giraud* v. *Giraud* (1879) 58 How. Prac. 175; but if there is a duty to speak, *Day* v. *Caton* (1876) 119 Mass. 513; and the silence gives encouragement, *McCouch* v. *Loughery* (Pa. 1878) 12 Phila. 416; or offers an inducement, *Patterson* v. *Lytle* (1849) 11 Pa. St. 53; and the plaintiff is misled to his injury, *Hamlin* v. *Sears* (1880) 82 N. Y. 327; it amounts to a fraud and creates an estoppel. *Staton* v. *Bryant* (1877) 55 Miss. 261. The defendant must have been silent knowing that some one was relying thereon aud either acting or about to act as he would not had the truth been told. *Allen* v. *Shaw* (1881) 61 N. H. 95. It is not enough, however, that he is silent knowing that some one else is acting under a mistaken belief. *Smith* v. *Hughes* (1871) L. R. 6 Q. B. 597. On the facts of the principal case the defendant should have been permitted to show his counterclaim.

EQUITY—RECONVEYANCE OF PROPERTY CONVEYED TO DEFRAUD CREDITORS. The grantor, having conveyed property to escape a possible liability as surety on a bond, sought a reconveyance. *Held*, equity would not aid him. *Massi* v. *Lavine* (Mich. 1905) 102 N. W. 665.

The statute 13 Eliz. c. 5, against fraudulent conveyances, applies to contingent liability, *Gannard* v. *Eslava* (1852) 20 Ala. 732, 741; hence to sureties. *Bay* v. *Cook* (1863) 31 Ill. 337, 347. Such a conveyance is valid as between the parties, *Proseus* v. *McIntyre* (1849) 5 Barb. 424; but the courts generally will not entertain a suit to put the grantee in possession, *Southern Ev. Co.* v. *Duffey* (1873) 48 Ga. 358; *Kirkpatrick* v. *Clark* (1890) 132 Ill. 342; for that would be executing the illegality. *Mediaris* v. *Granberry* (Tex. 1905) 84 S. W. 1070; *Harrison* v. *Thatcher* (1872) 44 Ga. 638. However, a conveyance may be had if (1) the grantor asks it in the interest of his creditors, *Carll* v. *Emery* (1888) 148 Mass. 32; or if (2) he conveyed under duress, *Anderson's Admr's* v. *Merideth* (1885) 82 Ky. 565; *Austin* v. *Winston* (Va. 1806) 1 H. & M. 32, 3 Am. Dec. 583; Bump, Fraudulent Conveyances, 2nd ed. 442; the parties not being in pari delicto. *Sanford* v. *Reed* (Ky. 1905) 85 S. W. 213; 2 Pomeroy's Equity 916; see also *Hinsdill* v. *White* (1861) 34 Vt. 558.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND—ADEQUATE REMEDY AT LAW. In a bill seeking specific performance of defendant's contract to convey certain land, the plaintiff alleged the fact

of the contract, the price to be paid, his contract to resell, and the price to be received. *Held*, bill dismissed, the plaintiff having shown an adequate remedy at law. *Hazelton* v. *Miller* (1905) 33 Washington L. R. 217.

While specific performance of contracts to convey land is granted as a matter of course, *Old Col. R. R.* v. *Evans* (Mass. 1856) 6 Gray 25; *Bogan* v. *Daughdrill* (1874) 51 Ala. 312; Story, Equity Jur. § 751; the basis of the relief is the inadequacy of the remedy at law. *Willard* v. *Tayloe* (1869) 8 Wall. 557; *Duff* v. *Fisher* (1860) 15 Cal. 376; Pomeroy, Spec. Perf. §§ 9, 11. Therefore, if the adequacy of the legal remedy appears, as in the principal case from the pleadings, equity should refuse to interfere. *Blake* v. *Flatley* (1888) 44 N. J. Eq. 228.

EVIDENCE—HEARSAY—STATEMENTS MADE BY INTERPRETER. To discredit a witness, the plaintiff called one H., who testified to former statements by the witness, made to H. through an interpreter. *Held*, such evidence, not being hearsay, was admissible. The objection went only to the weight. *People* v. *Jailles* (Cal. 1905) 79 Pac. 965.

Testimony as to an interpreter's translation is hearsay as to the original statement. *State* v. *Terline* (1902) 23 R. I. 530; Wigmore Evidence § 668, 1810. This rule does not apply where the interpreter acts as the agent of those conversing, as where later one of them becomes a party to a suit, the statements being considered admissions. *Com.* v. *Vose* (1892) 157 Mass. 393; *Sullivan* v. *Kuykendall* (1885) 82 Ky. 483; *Camerlin* v. *Palmer Co.* (1865) 10 Allen 539; Greenleaf Evidence 16th ed. §§ 162p, 430j; 439e. But a formal interpreter is not necessarily an agent. *Diener* v. *Diener* (1857) 5 Wis. 483. The principal case, while in line with a suggestion in *People* v. *Sierp* (1897) 116 Cal. 249, is not within the above rule and is directly opposed to earlier decisions of the same court. *People* v. *Lee Fat* (1880) 54 Cal. 527; *People* v. *Ah Yute* (1880) 56 Cal. 119; *People* v. *Lee Ah Yute* (1882) 60 Cal. 95. The court should have held the evidence inadmissible, but refused to disturb the verdict, the testimony being harmless. 5 COLUMBIA LAW REVIEW 326.

INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER. A railroad porter, sent to flag approaching trains, sat down on the track and, involuntarily falling asleep, was killed. In an action on an accident policy, *held*, his conduct did not constitute voluntary exposure to unnecessary danger. *Bateman* v. *Insurance Co.* (Mo. 1905) 85 S. W. 128.

Voluntary exposure to unnecessary danger is not synonymous with negligence. *Payne* v. *Frat. Acc. Ass'n* (1903) 119 Iowa 342; *Lehman* v. *G. E. C. & I. Co.* (1896) 39 N. Y. Supp. 912. To constitute a voluntary exposure, there must be either a conscious and intentional assumption of a risk which reasonable and ordinary prudence would pronounce dangerous, *Equitable Acc. Ins. Co.* v. *Osborn* (1889) 90 Ala. 201; *Keene* v. *N. E. Mut. Acc. Ass'n.* (1894) 161 Mass. 149; or gross negligence displaying a spirit of recklessness, *Acc. Co.* v. *Dorgan* (1893) 58 Fed. 945; *Johnson* v. *Guarantee Co.* (1897) 115 Mich. 86, 40 L. R. A. 440, note; such as really constitutes a voluntary exposure. *DeLoy* v. *Travellers' Ins. Co.* (1895) 171 Pa. St. 1. Dangers incident to the insured's occupation are not unnecessary dangers within the meaning of the policy. *Nat'l Benefit Ass'n* v. *Jackson* (1885) 114 Ill. 533.

MASTER AND SERVANT—FELLOW SERVANTS—SAFE APPLIANCES. Defendant corporation having a contract to erect a steel framework for the roof of a building, put a competent foreman in charge of the work with authority to employ and discharge workmen. The defendant provided enough strong rope for the hoisting on the job, but the foreman refused to allow it to be substituted for some which was worn and weak. The plaintiff was injured by a falling beam when the rope broke. *Held*, the

foreman was a fellow servant of the plaintiff and therefore the defendant was not liable. *Vogel* v. *American Bridge Co.* (1905) 180 N. Y. 373.

The master is liable for negligently providing appliances with original defects, *Gottlieb* v. *Railroad Co.* (1885) 100 N. Y. 462; *Benzing* v. *Steinway* (1886) 101 N. Y. 547; or for failing to provide substitutes when old ones are worn or weak. *Corcoran* v. *Holbrook* (1875) 59 N. Y. 517; *Cone* v. *Railroad Co.* (1880) 81 N. Y. 206; *Fuller* v. *Jewett* (1880) 80 N. Y. 46; *Baker* v. *Railroad Co.* (1880) 95 Pa. St. 211. But where, as in the principal case, the master provides proper and sufficient appliances, he may delegate the duty of substitution to competent fellow servants and is not liable for those servants' neglect. *Johnson* v. *Boston Towboat Co.* (1883) 135 Mass. 209; *McGee* v. *Boston Cordage Co.* (1885) 139 Mass. 445; *Creegan* v. *Marston* (1891) 126 N. Y. 568.

MORTGAGE—EXTENSION OF TIME OF PAYMENT—REDUCTION IN RATE OF INTEREST. The assignee of a mortgage agreed with the mortgagor to extend the time of payment and reduce the rate of interest. Subsequently the mortgagor granted to the defendant, and the assignee assigned to the plaintiff. On a suit to foreclose, *held*, the agreement modified the mortgage and was within the Recording Act, Real Property Law 1896, c. 46; and being unrecorded was not binding on an assignee without notice. *Weideman* v. *Pech* (1905) 92 N. Y. Supp. 493.

Parol contracts to extend the time of payment of a mortgage do not modify the mortgage, whether they are executory, *Eddy* v. *Graves* (1840) 23 Wend. 82; or executed. *Davis* v. *Jewett* (la. 1851) 3 Greene 226. Specialties have no greater effect where they stipulate for an extension in time of payment on a promissory note, *Mendenthal* v. *Lenwell* (Ind. 1839) 5 Blackfd. 125; or a bond, *Deux* v. *Jeffries* (1594–5) Cro. Eliz. 352; or for increasing the sum for which the mortgage is security, *Stoddart* v. *Hart* (1861) 23 N. Y. 556; neither do agreements changing the rate of interest modify the mortgage. *Gardiner* v. *Emerson* (1866) 40 Ill. 296; *Lord Milton* v. *Edgeworth* (1773) 6 Brown Ca. Parl. 580. These agreements are not defeasances. *Chandler* v. *Herrick* (1821) 19 Johns. 129; and while they are equitable defenses, *Dodge* v. *Crandell* (1864) 30 N. Y. 294; in a pure legal action they may not be pleaded in bar. *Mills* v. *Todd* (1882) 83 Md. 25; *Chandler* v. *Herrick*, supra. The conclusion in the principal case as to the equities seems equally unsound, Pomeroy, Equity § 707 et seq.; and the case goes far to overthrow the doctrine of non-negotiability of mortgages. *Trustees of Union College* v. *Wheeler* (1874) 61 N. Y. 88.

MORTGAGE—UNRECORDED PARTIAL RELEASE—RIGHTS OF ASSIGNEE. The assignee of the mortgagee, having released part of the premises to the mortgagor, assigned the mortgage to the plaintiff, without notice of the release. The mortgagor sold the released premises to the co-defendant, a railroad company, which recorded the deed but not the release. A railroad was built and operated on the premises. *Held*, as the plaintiff can not be charged with constructive notice, he is protected by the Recording Act §§ 1, 36, 37, 38. *Gibson* v. *Thomas* (1905) 180 N. Y. 483.

A release is a conveyance within the Recording Act. *St. John* v. *Spaulding* (N. Y. 1873) 1 T. & C. 483. The open possession and use of premises will not be constructive notice of a claim adverse to a mortgage lien, where the holder claims under a conveyance from the mortgagor, *Briggs* v. *Thompson* (1895) 86 Hun 607; but such is not the rule if the occupant is a stranger to an apparent or recorded title. *Phelan* v. *Brady* (1890) 119 N. Y. 587. The principal case is well within the rule. Other jurisdictions would seem in accord. *Kirby* v. *Tallmadge* (1896) 160 U. S. 379; *Smith* v. *Yule* (1866) 31 Cal. 180; *Plumer* v. *Robertson* (Pa. 1821) 6 S. & R. 179; *Maxwell* v. *Hartmann* (1881) 50 Wis. 660.

PLEADING AND PRACTICE—TRIAL—ABSENCE OF JUDGE. The absence of the presiding judge during part of a civil trial was alleged as reversible error. *Held*, since it was by consent of the parties and neither was injured thereby, it was not reversible error. *Dehougne* v. *West. Union Tel. Co.* (Tex. 1905) 84 S. W. 1066.

The rule requiring the continuous presence of the judge in a criminal trial is very strict, *Thompson* v. *People* (1893) 144 Ill. 378; and cannot be varied even by consent of the parties. *Meredith* v. *People* (1877) 84 Ill. 479. He is an essential part of the Court, *O'Brien* v. *People* (1892) 17 Col. 561; and without him there can be no trial. *Foster* v. *State* (1893) 70 Miss 755. But he need not remain within the court room itself, *State* v. *Smith* (1881) 49 Conn. 376; though he must retain control of the proceedings. *Turbeville* v. *State* (1879) 56 Miss. 793. Although this rule is sometimes relaxed in civil trials, *Baxter* v. *Ray* (1883) 62 Iowa 336; yet if it appears that the judge's absence interfered with the proper conduct of the trial it will be ground for reversal, *Smith* v. *Sherwood* (1897) 95 Wis. 558; and the previously obtained consent of the parties will be disregarded. *Brownell* v. *Hewitt* (1876) 1 Mo. App. 360.

PLEADING AND PRACTICE—CERTIORARI— CITY COUNCIL PROCEEDINGS. The petitioner sought a writ of certiorari to review the action of the common council, finding him guilty of deliberate and false statements concerning his colleagues. *Held*, as the council proceedings involved no property right, and were not judicial, the writ did not lie. *Butler* v. *Chicago* (Ill. 1905) 30 Nat. Corp. Rep. 194.

As in the principal case the proceeding was at most a vote of censure, in no way affecting the rights of the parties, the writ which, for review, lies only after the final determination of a cause, was properly denied. *Railroad* v. *Whipple* (1859) 22 Ill. 105; *People* v. *County Judge* (1871) 40 Cal. 479; *Lynde* v. *Noble* (1822) 20 Johns. 80. However, the writ is not restricted to cases involving property rights, it being used to review removals from office, *Mayor* v. *Shaw* (1854) 16 Ga. 172 *People* v. *French* (1890) 119 N. Y. 493; and see *Com's* v. *Griffin* (1890) 134 Ill. 330, 341; the right to which is not a property right. *State* v. *Auditor* (1838) 2 Ill. 537; *Connor* v. *Mayor* (1851) 5 N. Y. 285, 301; *State* v. *Douglas* (1870) 26 Wis. 428.

PLEADING AND PRACTICE—DIRECTING A VERDICT. The defendant moved the court to direct a verdict, on the ground that the plaintiff's evidence did not sustain his alleged cause of action. *Held*, the evidence should go to the jury unless the court would feel compelled to set aside a verdict for the plaintiff. *Cobb* v. *Glenn Boom Lumber Co.* (W. Va. 1905) 49 S. E. 1005.

While the rule governing such cases has been variously stated, *Ryder* v. *Wombell* (1868) L. R. 4 Exch. 32; *Ewing* v. *Goode* (1897) 78 Fed. 442; *Laidlaw* v. *Sage* (1899) 158 N. Y. 73; its best expression is, that unless the court is willing to say that no twelve reasonable men could decide other than one way, the evidence should go to the jury. *Bridges* v. *Directors* (1874) L. R. 7 H. L. 213. This may be determined when the plaintiff closes, on the theory that the alleged cause of action has not been proved, *Gildersleeve* v. *Atkinson* (1891) 6 N. M. 250; or when the defendant rests, a valid defence being proved. *Giermann* v. *Railroad Co.* (1889) 42 Minn. 5. But if the credibility of witnesses is involved, the evidence must go to the jury. *Dinan* v. *Mut. Benefit Ass.* (Pa. 1904) 60 Atl. 10; *Walters* v. *Railroad Co.* (1904) 178 N. Y. 50.

PLEADING AND PRACTICE—EVIDENCE—TAKING DEPOSITIONS TO THE JURY ROOM. The court upon motion of the defendant, the plaintiff objecting, sent to the jury room depositions introduced by the defendant to impeach the plaintiff's oral testimony. *Held*, error, and new trial granted, the written evidence tending unduly to influence the jury. *Sheddon* v. *Stiles* (Ga. 1905) 49 S. E. 719.

At common law, jurors should not take from the bar any writings not under seal, except by permission of both parties; but to do so would not avoid their verdict. Co. Litt. 227; 12 Mod. 520; Cro. Eliz. 411; *Rex* v. *Burdett* (1697) 1 Ld. Rymnd. 148. This rule is still followed, *Howland* v. *Willetts* (1853) 9 N. Y. 170; *Hansbrough* v. *Stinnett* (Va. 1874) 25 Grat. 495; but see, *U. S.* v. *Clarke* (1818) 2 Cranch C. C. 152; *Negroes Jerry et al.* v. *Townshend* (1856) 9 Md. 145. But the jury should not take depositions not given in evidence at all, *Whitney* v. *Whitman* (1809) 5 Mass. 405; but see *Rex* v. *Burdett*, supra; or containing unerased excluded matters. *Rawson* v. *Curtis* (1858) 19 Ill. 455; *Shepherd* v. *Thompson* (1827) 4 N. H. 213. The reason for excluding given in the principal case, followed in *Welch* v. *Ins. Co.* (1883) 23 W. Va. 288, ceases if the evidence is all in writing. *Hairgrove* v. *Millington* (1871) 8 Kan. 480. Where not settled by statute, Thompson, Trials § 2595, the question is usually discretionary with the court. *Whitehead* v. *Keys* (Mass. 1862) 3 Allen 495, *Spence* v. *Spence* (Pa. 1835) 4 Watts 165.

PLEADING AND PRACTICE—JURISDICTION OF MUNICIPAL COURT—INTEREST ON UNLIQUIDATED DAMAGES. The plaintiff brought an action in the Municipal Court for breach of a contract to build a house, asking a judgment for $500 with interest. By statute the jurisdiction of the court was confined to sums of $500 and less. *Held*, as interest was demanded on unliquidated damages, the court had jurisdiction. *Hamburger* v. *Hellman* (1905) 102 App. Div. ——

If the damages are liquidated, interest follows as a matter of right, *Walden* v. *Sherburne* (1818) 15 Johns. 409; *Little* v. *Banks* (1881) 85 N. Y. 258; but generally interest will not be given on unliquidated damages for breach of contract, *Mansfield* v. *Railroad Co.* (1889) 114 N. Y. 331; except where the party charged may easily ascertain the sum owed, as by reference to market values. *Sloan* v. *Baird* (1900) 162 N. Y. 327; *Gray* v. *Railroad Co.* (1899) 157 N. Y. 483. In the principal case, the plaintiff's damages being unliquidated and not entitling him to interest, as such, *Gas Co.* v. *Richards* (1889) 130 Pa. St. 37; Hale on Damages § 364; the demand for them could be regarded as surplusage, thus leaving the amount claimed within the limitations of the Municipal Court's jurisdiction.

PLEADING AND PRACTICE—POWERS OF THE COURT TO ACT ON ITS OWN MOTION—NEW TRIALS. A party in a civil action having failed to take exception to an erroneous instruction of the court, was disqualified to move for a new trial. *Held*, the court had power, irrespective of statute, to grant a new trial on its own motion. *Nulton* v. *Croskey* (Mo. 1905) 85 S. W. 644. See NOTES, p. 467.

QUASI CONTRACTS—RECOVERY FOR SERVICES UNDER A PAROL CONTRACT—MEASURE OF DAMAGES. Defendant's testator promised to devise land to the plaintiff in consideration of her services, but failed so to do, and the plaintiff sues the executor upon a quantum meruit. *Held*, the contract value of the land is conclusive as to the measure of damages. *Walters* v. *Cline* (Ky. 1905) 85 S. W. 209.

The decisions are in conflict as to the measure of damages. When the contract is unenforceable because of the Statute of Frauds the contract price is conclusive; *La Du-King Mf'g Co.* v. *La Du* (1887) 36 Minn. 473; contra, *Emery* v. *Smith* (1865) 46 N. H. 151; *Steel Co.* v. *Atkins* (1873) 68 U. S. 421; but under the latter cases such a contract may be received in evidence. *Frazer* v. *Howe* (1883) 106 U. S. 563, 574. A distinction has been taken between land and an agreed fixed price as consideration. *McElvoy* v. *Ludlum* (1880) 32 N. J. Eq. 828, 837. As in either case the aim of the plaintiff's suit is the restitution of benefits actually conferred, and the contract is shown as an admission of the value of the services, Keener on Quasi-Contracts 290, it appears immaterial whether the consideration is and or money.

REAL PROPERTY—WATER BOUNDARIES. The state of Texas granted to the United States shore lands which were added to by accretion during some fifty years following. *Held*, the newly made lands belonged to the state of Texas. *State* v. *Jadwin* (Texas 1904) 85 S. W. 490.

The Ohio river formed the boundary between two Kentucky counties. By a sudden shift, the river found a new channel, thus cutting off a part of one county and making it contiguous to the other. *Held*, the boundary was not affected. *Witt* v. *Willis* (Ky. 1905) 85 S. W. 233.

The grantee of shore lands, 2 COLUMBIA LAW REVIEW 422, or riparian lands, *Jeffries* v. *Land Co.* (1890) 134 U. S. 178, takes them subject to a shifting boundary. He loses title to the land gradually encroached upon, *Wilson* v. *Shiveley* (1884) 11 Or. 211; but, as compensation for this burden, *Morgan* v. *Livingston* (La. 1819) 6 Martin 19, 234; he is given additions by accretions, *Banks* v. *Ogden* (1864) 2 Wall. 57; or reliction. *Warren* v. *Chambers* (1867) 25 Ark. 120. *State* v. *Jadwin*, supra, is opposed to an overwhelming line of authorities. Gould on Waters 3rd Ed. 307, n. 1. However, when these changes, whether on the sea, *Muley* v. *Norton* (1885) 100 N. Y. 424; or a lake, *Warren* v. *Chambers* (1867) 25 Ark. 120; or a stream, *Henning* v. *Bennett* (1892) 63 Hun 592; are sudden or violent, neither the boundaries nor the titles of the adjoining lands are affected thereby.

REAL PROPERTY—FIXTURES—RAILS OF A STREET RAILWAY. Rails bought under a conditional sale were laid; the railway was then sold; in trover brought by the conditional vendor against the purchaser of the road without notice, *held*, the action could be maintained, the rails not having become part of the realty. *Lorain Steel Co.* v. *Street Railway Co.* (Mass. 1905) 73 N. E. 646.

Rails when part of a railway track are usually regarded as realty, *Van Keuren* v. *Railroad Co.* (1875) 38 N. J. L. 165; and the title of a conditional vendor is defeated by a subsequent purchase or mortgage without notice. *Hunt* v. *Iron Co.* (1867) 97 Mass. 279. But under the rule that manifested intention determines the nature of fixtures, 2 COLUMBIA LAW REVIEW 407, the rails put down by a bare licensee remain personalty. *Northern Central Railroad Co.* v. *Canton Co.* (1868) 30 Md. 347. Proceeding upon this principle, the court in the principal case would seem to have been correct in its conclusion, as the street railway had no interest in land of which the rails could form a part. *Attorney Gen'l* v. *Railroad Co.* (1878) 125 Mass. 515.

REAL PROPERTY—VENDOR'S LIEN RESERVED IN DEED. The plaintiff, assignee of properly renewed purchase money notes, given for a deed which expressly retained a vendor's lien, obtained from the vendor's heirs a quit claim deed, and sued to recover the land, or for judgment on the notes with foreclosure of the equitable lien. *Held*, the plaintiff had the legal title. But as to rescind the contract would be inequitable, judgment was given on the notes, with foreclosure. *McCord* v. *Haines* (Tex. 1905) 85 S. W. 504.

A deed retaining a vendor's lien, gives the vendee legal title, and the vendor an equitable claim, which follows the purchase money notes for their value. *Gordon* v. *Rixey* (1882) 76 Va. 694, 700; *Moore* v. *Lackey* (1876) 53 Miss. 85. In Texas, until payment, the situation as to title is reversed. *Peters* v. *Clements* (1876) 46 Tex. 114, 123. The vendor has also an equitable lien, which follows the notes. *Elmendorf* v. *Beirne* (1893) 4 Tex. Civ. App. 188. The vendor's legal title passes only by express conveyance. *Hamblen* v. *Folts & Walsh* (1888) 70 Tex. 132; but may not be disposed of to defeat the lien of the assigned note. *Russell & Seisfeld* v. *Kirkbride* (1884) 62 Tex. 455. Though a barred note extinguishes the lien, *Hale* v. *Baker & Rice* (1883) 60 Tex. 217, the legal rights

remain. *Burgess* v. *Millican* (1878) 50 Tex. 397; *White* v. *Cole* (1895) 87 Tex. 500. If the legal title and equitable lien vest in the same person, he may sue on the note and foreclose, or rescind the contract and recover possession of the land. *Hale* v. *Baker & Rice*, supra; *Stephens* v. *Mathews' Heirs* (1887) 69 Tex. 341, 344. But rescission is not not granted if inequitable to the vendee. *Hamblen* v. *Folts & Walsh*, supra.

TAXATION.—LIABILITY OF A FOREIGN CORPORATION. A corporation was organized in New Jersey to take title to land in New York City, occupied by an office building, and owned by tenants in common. The comptroller taxed the corporation as for a license and franchise tax under §§181, 182 of the tax law, which makes every foreign corporation carrying on its business within the state liable to a tax computed upon the basis of the capital employed by it within the state. *Held*, the holding and operating of such property was the employment of capital within the statute. *People* ex rel. *the Realty Co.* v. *Miller* (April 25, 1905) 181 N. Y. ——

Capital may be invested without being employed within the statute. *People* ex rel. *Fort George Realty Co.* v. *Miller* (1904) 179 N. Y. 49; *People* ex rel. *Hydraulic Co.* v. *Roberts* (1898) 157 N. Y. 49; aff. 30 App. Div. 80. The sole purpose of the relators in each case was the holding of property, but the court distinguishes the principal case as an active employment, and the other as a passive use of capital, although in the Fort George case there was a small rent. The distinction seems to be one of degree, not of kind, depending on the amount of income received. It must be a question in each case for the court's discretion.

TORTS.—EXEMPLARY DAMAGES.—OPERATION BY SURGEON AGAINST CONSENT. The plaintiff submitted to a minor surgical operation, but expressly withheld consent to a major one which the operating surgeon, contrary to his promise, performed while she was under the influence of the anæsthetic for the minor operation. The surgeon acted believing it was for the plaintiff's good, and there were no charges of negligence or lack of skill. *Held*, the defendant's act was wilful, malicious, violent, oppressive, wanton, and reckless, and exemplary damages awarded. *Pratt* v. *Davis* (Ill. 1905) 37 Chicago Legal News 213. See NOTES, p. 464.

TRUSTS.—CONTRACT LIABILITY OF A TRUSTEE FOR APPROPRIATION OF THE TRUST FUNDS. A cestui sued her trustee for conversion of the trust funds. *Held*, that the right of action was founded on the implied promise of the defendant to pay over the stock, which he had agreed to hold in trust, and while the action sounded in tort, it rested in contract. *Martin* v. *Gunnison* (1903) 27 Ohio C. C. 113; aff. (1904) 71 Ohio St. 480.

Some early cases allow, for a breach of trust, an action in case, *Megod's* Case (1585) 4 Leonard 225; *Butler* v. *Butler* (1657) 2 Sid. 21; *Jevon* v. *Bush* (1685) 1 Vern. 342, 344; or in assumpsit. *Smith* v. *Jameson* (1794) 5 T. R. 601, 603. But the rule found in *Forde* v. *Hoskins* (1615) 1 Rolle 125; *Turner* v. *Sterling* (1671) Freeman 15; *Bonardiston* v. *Soame* (1671) 6 How. St. Trials 1063, 1098; *Sturt* v. *Mellish* (1743) 2 Atk. 610, 612; that a cestui's remedy for breach of trust lies solely in equity, is now well settled. *Holland* v. *Holland* (1869) L. R. 4 Ch. App. 449, 451; *Johnson* v. *Johnson* (1876) 120 Mass. 465; except where an account has been stated by the trustee. *Roper* v. *Holland* (1835) 3 A. & E. 99. But where, as in the principal case, the trust has terminated except for the payment of an ascertained sum, the cestui may, in the United States generally, sue in assumpsit. *Underhill* v. *Morgan* (1865) 33 Conn. 105, 109; *Chase* v. *Perley* (1889) 148 Mass. 289, 294; *Lynde* v. *Davenport* (1885) 57 Vt. 597.